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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JANET RIEDMAN, as Trustee, etc.,	
Plaintiff and Respondent,	G056478
v.	(Super. Ct. No. 30-2016-00864768)
MOHAMAD TABRIZI et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Michael E. Sayer for Defendants and Appellants.

O'Neil, William E. Halle for Plaintiff and Respondent.

* * *

Starting in 2006, Mohamad and Sima Tabrizi (collectively Tabrizi) operated Café Lafayette, a restaurant in Seal Beach. Tabrizi leased the property from the F&J Riedman Family Trust (Riedman). In 2014, Tabrizi subleased the property to Giovanna Enterprises, LLC, et al. (collectively Giovanna). Tabrizi remained on the lease as a guarantor of the rent. In May 2016, Giovanna abandoned Café Lafayette. Riedman later leased the property to a new tenant.

In July 2016, plaintiff and respondent Riedman filed a complaint against defendant and appellant Tabrizi alleging a breach of the guaranty. Tabrizi filed an answer alleging Riedman failed to take reasonable steps toward mitigating its losses.

During a court trial, Tabrizi's counsel asked Sima: "After the abandonment by [Giovanna] and before the filing of the lawsuit . . . , if [Riedman] had contacted you and given you permission to go back into the restaurant . . . what would you have done?" Riedman's counsel said: "Objection. Calls for speculation." The trial court sustained the objection. Counsel also asked: "Had someone contacted you about [Giovanna's] default on the rent, would you have cured the outstanding rent at that time." The court again sustained an objection on speculation grounds. The court later entered a judgment in favor of Riedman.

On appeal, Tabrizi claims the trial court improperly sustained the two objections. We disagree. Counsel twice asked a lay witness what she may have done two years earlier under an assumed set of facts. The questions called for speculative answers. Therefore, the court did not abuse its discretion.

In any event, even if we were to assume evidentiary error, we would not find it to be prejudicial. The trial court told Tabrizi's counsel that it was aware of what Sima would have testified to had she been allowed to answer. Further, under the lease terms, the lessor (Riedman) was under no obligation to notify the guarantor (Tabrizi) that the new sublessee (Giovanna) was in default. Thus, it is not reasonably probable that the excluded answers would have changed the outcome of the trial.

I

FACTS AND PROCEDURAL HISTORY

Effective November 1, 2006, Café Lafayette LLC (Lessee), signed a six-year lease with Riedman (Lessor) to rent a commercial space in Seal Beach. Tabrizi (Guarantor) agreed to "guarantee the prompt payment by Lessee of all rents and all other sums" due under the lease.

The guaranty provided: "No notice of default by Lessee under the Lease need be given by Lessor to Guarantors . . . . Lessor may proceed immediately against Lessee and/or against Guarantors following any breach or default by Lessee . . . ." It also provided: "Lessor shall have the right to proceed against Guarantors following any breach or default by Lessee under the Lease without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors."

In 2009 and 2012, the parties signed amendments to the lease. The second amendment extended the lease term for an additional five years (to October 31, 2017). Throughout the later years of its tenancy, Café Lafayette (Tabrizi) struggled to make timely rent payments.

Effective December 31, 2014, the parties signed a third amendment in which Riedman consented to an assignment of the lease (a sublease) from Tabrizi to Giovanna. The lease term was extended an additional two years (to October 31, 2019). The lease provided that Tabrizi would continue as guarantor under the original lease terms.

Giovanna's Abandonment and Riedman's Mitigation Efforts

In May 2016, sublessee Giovanna stopped paying rent. Giovanna posted a sign in the window advising customers that Café Lafayette was closed because "while we tried our best, we are not able to sustain a successful operation." On May 26, Riedman served Giovanna with a three-day notice to pay rent or quit.

In June 2016, Riedman served and filed a notice of abandonment. (Civ. Code, § 1951.3.) Riedman took possession of the property several days later and found that the property was "filthy" and rat infested. Riedman employed a cleaning service and a pest control company. Riedman paid for a public auction of abandoned property. Riedman employed a business broker in order to help find a qualified tenant. By November 2016, Riedman had signed a new lease with a new tenant.

Court Proceedings

In July 2016, Riedman filed a complaint (and later an amended complaint) alleging Tabrizi breached its guaranty.[1] The complaint prayed for unpaid rent and other "damages . . . in an amount of at least $116,447.00[.]" Tabrizi filed an answer asserting various affirmative defenses, including a failure by Riedman to take reasonable steps to mitigate its damages.

After a two-day court trial, the court filed a judgment in favor of Riedman awarding about $117,000 in damages. The court calculated damages approximately as follows: unpaid rent $80,000; broker's commission $23,000; legal expenses $12,000; auction expenses $800; and cleaning expenses $1,100. Tabrizi appeals.

II

DISCUSSION

Tabrizi argues that the trial court abused its discretion by sustaining two "calls for speculation" objections during Sima's testimony. We disagree. Further, even if we were to assume evidentiary error, we would not find it to be prejudicial.

We review a trial court's ruling on whether an examiner's question calls for a speculative answer under an abuse of discretion standard. (*People v. Thornton* (2007)

[1] There were other causes of action against other parties, but those matters are not relevant to the issues in this appeal.

41 Cal.4th 391, 429.) We will not disturb the ruling except on a showing that the court exceeded the bounds of reason, considering all of the circumstances; in other words, an appellant must convince us that the trial court's ruling was either arbitrary, capricious, or patently absurd. (*Saxeny v. Goffney* (2008) 159 Cal.App.4th 316, 332.)

As far as evaluating prejudice: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice . . . ." (Evid. Code, § 354.)[2] A miscarriage of justice occurs only when we are convinced "that it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 750-751.)

1. Legal Principles Concerning Witness Speculation

Generally speaking, witnesses may only testify to facts within their personal knowledge. Except for experts, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (§ 702.) The opinion testimony of lay witnesses is further limited: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on *the perception of the witness*; and [¶] (b) Helpful to a clear understanding of his testimony." (§ 800, subds. (a) & (b), italics added.)

That is, a question that asks a lay witness to testify to facts the witness has not personally perceived, or to state an opinion not based on the witness's perception is a question that "'calls for speculation'" under sections 702 and 800. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 631; see, e.g., *People v Glancy* (1956) 142 Cal.App.2d 669, 680

[2] Further undesignated statutory references will be to the Evidence Code.

[the question: "'Is it possible, Miss Smith, that there could have been other meetings?'" was a question that called for speculative answer by a lay witness].)

A trial court may properly sustain an objection based on the form of the question, including questions that call for speculation. (See, e.g., *People v. Weber* (1906) 149 Cal. 325, 343 [the question: "'If any of those matters had been brought to your mind would it change your opinion?'" was "hypothetical and speculative"].) "*Speculation*, upon which neither court in nonjury case nor jurors in jury case may base verdict, *is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge*." (Black's Law Dict. (6th ed. 1990) p. 1399, col. 2, italics added.)

2. Relevant Proceedings

Towards the end of the two-day trial, which focused on the mitigation of damages, Sima's counsel asked her on direct examination, "After the abandonment by [Giovanna] and before the filing of the lawsuit . . . , if [Riedman] had contacted you and given you permission to go back into the restaurant, the location, what would you have done?" Riedman's counsel said: "Objection. Calls for speculation." The court sustained the objection. Tabrizi's counsel asked, "May I be heard on it, your honor?" The court responded, "I know why we're here. Let's move on."

Tabrizi's counsel then asked Sima, "Back at the time the abandonment took place, did you have an interest in going back into the restaurant and curing the default on the restaurant?" She responded, "Yeah." Tabrizi's counsel then asked, "Had someone contacted you about [Giovanna's] default on the rent, would you have cured the outstanding rent at that time." She responded, "Yes." Riedman's counsel again stated: "Objection. Speculation." The court sustained the objection and granted Riedman's motion to strike Sima's answer.

Tabrizi's counsel said to the trial court, "I think it's only fair, and I think it's within the court's discretion to allow the witness to testify regarding what she would

have done to mitigate her damages because she's required -- or not only her damages, but the Riedman damages for loss of rent, what she would have done to mitigate those damages. I think that's an appropriate line of questioning . . . ."

The trial court responded, "I understand your position well enough to be able to speculate appropriately with respect to that which the witness might testify if she were to respond or allowed to be responding to the questions that you proposed, but I don't at this point plan to allow you to pose those questions because the answers . . . as [a] matter of evidence are speculative."

3. Analysis and Application

We agree with the trial court's evidentiary analysis. Sima was testifying as a lay witness. Tabrizi's counsel twice asked her what she "would have done" two years earlier under an assumed set of facts. That is, Sima was being asked to give her lay opinion in response to hypothetical questions. Sima's answers would not have been based on her own perceptions (such as estimating the speed of a car, or the distance between two objects). Rather, Sima would have been "theorizing about a matter as to which evidence is not sufficient for certain knowledge." (Black's Law Dict., *supra,* at p. 1399.) Thus, the trial court did not abuse its discretion when it sustained the two objections on the grounds that both questions called for speculative answers.

Tabrizi argues "the trial court precluded [Sima] from testifying that [she] had the ability and intent to have made the lease payments." We disagree.

The trial court's evidentiary rulings were in response to objections based on the *form of the questions*. The court did not preclude counsel from rewording the questions. Indeed, Sima was able to answer in the affirmative (without objection) when her counsel asked her a properly phrased question: "Back at the time the abandonment took place, *did you have an interest* in going back into the restaurant and curing the default on the restaurant?" (Italics added.) The court's rulings also did not preclude

Tabrizi from putting on other evidence demonstrating an ability to have made the lease payments two years earlier.

Tabrizi also argues: "By precluding [Sima's] testimony . . . , the trial court had no evidence upon which it may have [found] a reasonable inference that [Sima] had the ability and intent to make the monthly lease payment." Again, we disagree.

The gravamen of Tabrizi's argument in this appeal (as it was in the trial court) is that had Riedman immediately informed Sima that Giovanni defaulted on the lease, Sima would have taken various steps to help mitigate Riedman's losses (either by cleaning the restaurant herself, or by taking over the restaurant again, or by making the rent payments to the end of the lease term so as to avoid brokerage fees, etc.). But after sustaining the "calls for speculation" objections, the trial court said that it could reasonably anticipate what Sima would have testified to had she been allowed to answer.

That is, even if we were to assume error, it is not reasonably probable that Sima's answers would have led to a more favorable result; the court said that it already knew how Sima would likely have answered the questions. Therefore, it is probable that the court took the excluded evidence into consideration when it made its judgment.[3]

Moreover, by the terms of the lease—and by law—Riedman was not required to give notice to Tabrizi of sublessee Giovanna's default. (See Civ. Code, § 2807 ["A surety who has assumed liability for payment or performance is liable to the creditor immediately upon the default of the principal, and without demand or notice"].)

Therefore, any speculative evidence about what Sima "would have done" had Riedman notified her about Giovanna's default was essentially irrelevant. Again, the issue at trial was whether Riedman took reasonable steps to mitigate its damages. The

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[3] Tabrizi did not request a statement of decision. Absent a statement of decision, we must presume all factual findings to support the trial court's judgment. (See *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 ["The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment"].)

court apparently found that it did. It is not reasonably probable that Sima's excluded testimony would have changed that outcome.

III

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.